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No. 511

In the Supreme Court of the United States

OCTOBER TERM, 1970

ALFRED M. LEWIS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner corporation was charged in the United States District Court for the District of Nevada with violating the Federal Food, Drug, and Cosmetic Act in permitting the adulteration of foods previously shipped in interstate commerce by exposure to insect infestation (21 U.S.C. 331(k)). By pre-trial motion petitioner moved to suppress evidence of the violations obtained by a Food and Drug Inspector pursuant to an inspection, without search warrant, of petitioner's warehouse, as authorized by 21 U.S.C. 374(a) (allowing inspections "at reasonable times").[1]

[1] In pertinent part, 21 U.S.C. 374(a) provides:

For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon present-

The inspection was conducted without objection from petitioner's agents. The district court granted the motion on the authority of *See* v. *City of Seattle*, 387 U.S. 541, and *Camara* v. *Municipal Court*, 387 U.S. 523, which, although decided after the inspection here involved, were given retroactive effect. The court also found that no consent to the inspection had been given by Mr. Riddle, the warehouse manager. The government appealed under 18 U.S.C. (Supp. V) 3731, and the court of appeals reversed, holding that consent had been given and that in any event *See* and *Camara* were not retroactive (Pet. App. A).

The decision of the court of appeals as to consent was correct under the undisputed facts set forth in its opinion. The present case is virtually identical to *United States* v. *Hammond Milling Co.*, 413 F. 2d 608 (C.A. 5), certiorari denied, 396 U.S. 1002, in which a finding of consent to an inspection was sustained. See also *United States* v. *Duffy*, 282 F. Supp. 777 (S.D. N.Y.). There is no conflict with *United States* v. *J. B. Kramer Grocery Co.*, 418 F. 2d 987

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ing appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. * * *

(C.A. 8) and *United States* v. *Stanack Sales Co.*, 387 F. 2d 849 (C.A. 3), relied on by petitioner, where the courts found, on the basis of the particular facts before them, that the consent given was not voluntary but a submission to authority. Cf. *Bumper* v. *North Carolina*, 391 U.S. 543. Accordingly there is no need in this case to reach the question whether *See* and *Camara* should be applied retroactively.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

[2] We note further that it is not wholly clear whether the principle enunciated by *See* and *Camara*, that absent consent a warrant is required, is applicable to Food and Drug inspections, as to which there are explicit statutory provisions that were fully complied with here. Compare *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72.

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